No. 14,618

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

BEKINS VAN & STORAGE COMPANY, a corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF IN SUPPORT OF APPELLEE'S POSITION.

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Statement of Facts.

In order to make a complete presentation, we feel it desirable to present our own statement of facts.

Appellee is engaged in the business of moving and storing of household and commercial goods, the moving of used office equipment and furniture, the moving of stores and commercial and industrial operations, rug cleaning, fur storage, and rental of office and building space. Its principal place of business is located in Los Angeles, California [Tr. 35].

Appellee's business consists of 19 divisions, which include 36 warehouses, within the State of California. Each division covers a defined operational territory. The division is the basic organizational unit of the business for substantially all purposes. Certain divisions consist of a single warehouse. At each warehouse employees are regularly engaged in the storage, cartage, packing and handling of goods. All warehouses except one regularly engage in receiving, storing and handling of commercial goods [Tr. 35].

One of the divisions in the Southern California area is the East Los Angeles Division. This Division consists principally of five warehouses and the division office [Tr. 37]. Appellant contends that one of such warehouses (referred to herein as the "Alameda warehouse"), fails to meet the test of exemption as a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act.

Appellant concedes that whether considered on a division or other basis, all other divisions and all of the other 36 warehouses which are included within their respective divisions, are exempt as retail or service establishments [Tr. 126]. The Alameda warehouse alone is claimed not to be so exempt. This result is based upon the contention that this warehouse, and not the division of which it is a part, must be considered as a separate establishment and as such does not come within the retail or service exemption.

Appellee contends that the division which is the basic business and operating unit of the company, rather than just a physically separated building, is the separate establishment within the meaning of Section 13(a)(2).

The business of Appellee was commenced in 1895 in Los Angeles. Since that time it has grown and expanded principally with respect to the moving and storage of household goods. Because of expansion and growth, it has been necessary from time to time for it to acquire new warehouse space, or warehouse additions. This space has been provided in separate buildings. However, the Company could carry on its operations within the division as well or better if all of its business were carried on in a single large building instead of in five buildings geographically separated [Tr. 42, 92, 94, 138].

While it has been the policy of Appellee to decentralize its management to the maximum extent possible, the smallest unit which can best provide an efficient local organization with full responsibility for all phases of the service provided, has been the 19 divisions into which the business has been and is divided. In the Los Angeles area, these divisions consist of the East Los Angeles Division, the Hollywood District, the Beverly Hills District, the Compton-Lynwood District, the Glendale District, the Wilmington District, which includes Hermosa and Redondo, the Inglewood District, the Long Beach District, the San Fernando Valley District, the Pasadena District, the Santa Ana District and the Santa Monica District [Tr. 36].

Originally Appellee's operations in the Los Angeles metropolitan area were organized with a West Los Angeles Division and an East Los Angeles Division. The West Los Angeles Division included Hollywood, West Hollywood, Beverly Hills and Santa Monica, and the East Los Angeles Division consisted of the present geographical area. Prior to 1946, following Appellee's policy of decentralization in so far as practicable, the West Los

Angeles Division was divided into the Hollywood, Beverly Hills, and Santa Monica divisions with separate division managers at each one. In 1946 and again in 1950, the Company gave thorough consideration to the dividing into smaller units of the East Los Angeles Division and after considering the facts decided that it was not practical nor feasible to divide the East Los Angeles Division consisting of five warehouses and division office into smaller units [Tr. 37].

Each of these divisions has a division office and division manager in charge who is responsible for all operations within the particular division [Tr. 36].

Each of the warehouses within the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of moving vans. The East Los Angeles Division is responsible for providing moving and storage and other services throughout its territory. The territory is not further subdivided or broken down as to services to be rendered by any particular warehouse within the East Lost Angeles Division [Tr. 38].

The division office and one warehouse of the East Los Angeles Division is located on Figueroa Street in Los Angeles. The Alameda warehouse is approximately 1¾ miles from Figueroa and the other four are from 1.8 to 3.5 miles from Figueroa [Tr. 38].

Of the employees working within the East Los Angeles Division, there are 11 who work at the Alameda warehouse. Of said 11 employees, one is a warehouse foreman who performs manual work [Tr. 40] but who is exempt under the Act, two are working foremen, and two are office workers who receive overtime compensa-

tion equal to that required by the Act [Tr. 39]. The remaining six are warehousemen. Except for such warehouse employees and those in the other warehouses, all employees, including management, supervision, sales, office *et cetera,* are located at the Division office.

All of the management, executive and administrative functions of the East Los Angeles Division are performed by individuals whose principal office and location is at the Division office and who give direct orders to and supervise the employees at all five warehouses in the East Los Angeles Division. These individuals make daily visits to each of the warehouses in the Division. They include a manager, an assistant manager, a superintendant, an accountant, a dispatcher, a sales manager and a storage manager. Each of these individuals performs his duties in his respective field for the entire East Los Angeles Division. Together they are responsible for the success of the operations of the Division as a whole. No one is responsible only for the success of the Alameda warehouse or any one of the other warehouses in the East Los Angeles Division [Tr. 42-43].

Appellee's East Los Angeles Division maintains moving van equipment at each of the five warehouses in the Division but all of the dispatching, and all moving orders are handled by the dispatching office at Figueroa, either by personal or telephone orders [Tr. 43].

All of the sales activities of Appellee are conducted from the Division office. Defendant has an active sales program which includes 7 salesmen for the East Los Angeles Division who are expected to and do carry on sales efforts and work in individual areas within the territory of the Division which is assigned to them. The territories of the re-

spective salesmen are assigned on the basis of approximately equal sales potential in each such territory, and without relation to the location of the warehouses within the Division [Tr. 43].

Eighty per cent of the customers of the East Los Angeles Division deal only with the Division office. Appellee runs newspaper advertisements advertising its services. The only phone number listed is that of the Division office [Tr. 44].

The principal work function of employees of the East Los Angeles Division and of the warehouses in the Division are packing, crating, loading, unloading and driving. Each of the employees of the Division will perform all of those functions at various times. Thus, most of the drivers are competent as packers and craters and most of the packers and craters are competent as drivers or helpers on moving jobs. These employees are frequently shifted back and forth from one warehouse to another within the East Los Angeles Division. For example, one or more employees are shifted to Alameda on an average of one day per week and one or more employees are shifted from Alameda to another warehouse in the East Los Angeles Division on an average of two days per week [Tr. 44].

The Company has adopted standard and thorough record keeping and control systems to measure the performance and success of its business. This is done on a division basis [Tr. 37].

The accounting records for the East Los Angeles Division are maintained at the Figueroa office as a single system of accounts and records. This Division's accounting system is the same as that used by Appellee for its

other divisions. No separate accounting records are maintained for the individual warehouses in the East Los Angeles Division. There is no need for separate accounting information for each warehouse within the Division. Furthermore, if Appellee maintained a separate system of accounting records for each warehouse within the East Los Angeles Division, the cost would be more than 100% greater than at present if the system were maintained at each warehouse, and more than 50% greater if such separate records were maintained at the Division office [Tr. 44-45].

The accounting office of the East Los Angeles Division prepares periodic financial statements including profit and loss statements and balance sheets for the Division as a whole. These are not broken down or classified in any manner for the respective warehouses located within the Division. No financial statements or profit and loss statements are separately prepared or maintained by Appellee for Alameda [Tr. 45].

A single set of bank accounts is maintained for the entire East Los Angeles Division, and all financial transactions for the entire Division, without segregation, are handled through said bank accounts. No bank accounts are maintained separately for Alameda or the other warehouses. Payroll records are not handled separately for Alameda, but are maintained at the Division office as a part of the payroll records for the entire Division [Tr. 45].

Appellee purchases some supplies in large lots for its entire operation in the Los Angeles metropolitan area. These are stored in one or another of its warehouses to be used by all of its warehouses. All other supplies for

the East Los Angeles Division are purchased by the Division in large lots for use by the entire Division. No supplies or materials are purchased separately for the needs or requirements of the Alameda or other warehouses separately [Tr. 45-46].

The East Los Angeles Division operates a repair and maintenance shop at Figueroa for all of the automotive equipment which it operates from all warehouses in the Division, and maintains there a single inventory of automobile parts and supplies for the use of the shop [Tr. 46].

It would not be practical, economic or good business practice for Appellee to divide its East Los Angeles Division into smaller management, administrative or operating units because (a) the cost of doing so would be much greater than the present costs, (b) the present single administration, management and operation permit much greater flexibility which is required for the kind of business done by the East Los Angeles Division as a whole, and (c) the type of work being handled by defendant requires the present method of management, administration and operation [Tr. 46].

All of the employees of Appellee working in its East Los Angeles Division are represented by a single local of the International Brotherhood of Teamsters Union within its jurisdiction. Such local also represents all of the union employees of Appellee working in other divisions in the Los Angeles metropolitan area. A single labor union contract uniformly applies to all of the employees of Appellee in its warehouses in the Los Angeles met-

ropolitan area, including the East Los Angeles Division. The contract applicable to all employees of the East Los Angeles Division provides that the normal workweek is 48 hours in 6 days, Monday through Saturday, overtime to be paid for work in excess of 8 hours in any one day, or in excess of the normal workweek. The International Brotherhood of Teamsters Union is one of the most powerful unions in the United States. Its representatives are familiar with and keep in close touch with the business and operating problems of the employers of its members including Appellee [Tr. 46-47].

If Appellee were forced to pay overtime to operating employees at its Alameda warehouse for work between 40 and 48 hours per week, this would upset prevailing wage patterns of Appellee and create wage inequities between groups of its employees, which, in turn, would have a very serious adverse effect upon the relations of Appellee with its employees and upon their morale. The present rates and benefits are based upon the foregoing method of operation [Tr. 47].

Statement of Legal Issue.

The issue of law concerns the meaning of "establishment" as that term is used in Section 13(a)(2) of the Fair Labor Standards Act, as amended.* Appellant contends that the Alameda warehouse alone is an establishment. Appellee contends that the East Los Angeles Divi-

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*C. 676, 52 Stat. 1060, as amended by C. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.*

sion is the establishment. Appellant concedes that if the Division is the "establishment" within the organization of Appellee, it is exempt as a retail establishment within the meaning of Section 13(a)(2) [Tr. 18].

This section provides:

> "Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

Summary of Argument.

Appellee contends that the decision of the District Court is correct and should be affirmed because:

(1) The Division, rather than merely one of the warehouses which comprise that Division, is the proper "establishment." Except for the physical work involved in the handling and storing goods in that building and work incidental thereto such as that of foremen necessary to directly supervise such work, all of the functions which comprise a place of business or an operating business unit —management, executive, administrative, operating, record keeping; employee relations, sales, dispatching, *et cetera,*— are conducted upon a division basis. The division, not a warehouse, is the basic business and operating unit of the company.

(2) Appellant's case is based only upon the separate geographical location of that building. Physical location alone is not a sufficient basis upon which to determine the existence of an establishment. While it may be a factor, the controlling considerations involve customary business organization, operation and practices. The purpose and application of Section 13(a)(2) requires this result, particularly in the light of its legislative history.

(3) No case that we have been able to find supports the position of Appellant in any significant way. To the extent that it is applicable, *Phillips v. Walling* (1945), 324 U. S. 490, 89 L. Ed. 1095, upon which Appellant almost entirely relies, supports the position of Appellee. The decision and the facts upon which it is based clearly demonstrate that business custom and practice must be considered. That case does not support the proposition that separate physical location is a controlling factor. The issue was not even involved there. The *Phillips* case further shows that whether the policy of the Act is being effectuated, and the practical effect of its application, are considerations in its interpretation. Appellant's position does not effectuate the policy of the Act, and runs counter to the policy of another federal statute, and is contrary to business practicalities.

(4) The interpretation of the term "establishment" under the various unemployment compensation statutes supports the position of Appellee. Similar considerations are involved in the application of those statutes.

ARGUMENT.

I.

The Separate Physical Location of a Building Comprising Only a Part of an Operating Business Unit, Does Not Constitute It as a Separate "Establishment" Under Section 13(a)(2). Business Organization and Practice Are Controlling Considerations.

A. The Facts Establish That Alameda Had No Identity Except as a Physical Location; Its Integration With the Division Is Complete.

The only identity which the Alameda warehouse has as distinguished from the East Los Angeles Division is that it is geographically separated from the office of the Division and from the other warehouses comprising the Division. The Alameda warehouse is an integral part of Appellee's East Los Angeles Division. This fact is established by uncontradicted evidence:

(1) The Alameda warehouse along with other warehouses in the Division is managed from the division office [Tr. 36].

(2) Each of the warehouses performs substantially the same function of packing, storing and moving goods of various kinds, both commercial and household [Tr. 35, 38].

(3) The division is the smallest administrative and operating business unit of the Company [Tr. 38, 46].

(4) Records for all warehouses, including payroll records, are kept only at the Division office [Tr. 40, 44].

(5) Supervision for the warehouse operation is provided by the Division [Tr. 42-43].

(6) The highest level of supervision at the Alameda warehouse is that of foreman, a position which involves manual work* [Tr. 40].

(7) Responsibility for successful operation is upon a division, not a warehouse basis. No one is responsible for the warehouse alone [Tr. 42-43].

(8) All dispatching and orders are handled from the Division office [Tr. 43].

(9) Sales activities are conducted on a division basis, and sales territory is allocated without regard to location of individual warehouses [Tr. 43].

(10) Almost all contact with customers is handled by the Division [Tr. 44].

(11) The working force in the Division is interchangeable, and in fact employees are frequently shifted among warehouses [Tr. 44].

(12) A single system of accounts and records for all warehouses is maintained for the entire Division at the Division office with no separate accounts at or for the individual warehouses [Tr. 44].

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*Appellant refers to this foreman as an "executive" employee (App. Br. pp. 5, 15). While he may be so under the regulations issued by Appellant, this is its own conclusion. Appellee, of course, cannot control whatever designations Appellant may make. Nor can Appellee be bound by any such characterization in this case. This is particularly true where Appellant goes to the extent of implying facts via its regulations which do not appear in, indeed are contrary to, those in the record, as where by its own definition it purports to show that this foreman is in "sole charge of an independent establishment or a physically separated branch establishment" (App. Br. p. 15 fn. 6). Appellant cannot be heard to supply factual deficiencies in the record to support its case by references to regulations not even in issue.

(13) No separate financial statements are made for each warehouse; all are on a division basis [Tr. 45].

(14) Only one bank account is maintained for the entire Division [Tr. 45].

(15) All supplies used by the various warehouses are purchased either on a company-wide or division-wide basis [Tr. 45-46].

(16) Repair and maintenance of automotive equipment is handled only on a division-wide basis [Tr. 46].

(17) It would be inefficient to administer the company on a separate warehouse basis [Tr. 46].

(18) All employees of the Division are represented by a single local of the Teamsters Union, one collective bargaining agreement applying uniformly to all [Tr. 46-47].

The Alameda warehouse is therefore clearly not a place of business or an operating business unit in any ordinary or usual sense. The only function performed there is the physical one of moving and storing goods and incidental activities such as the routine junctions of the office workers. This involves only those employees necessary to accomplish this work together with those who are required to directly supervise the work of such employees at the first level and who themselves engage in such work. All other functions which comprise a place of business or an operating business unit—management, executive, administrative, operating, record keeping; employee relations, sales, dispatching and all supervision above the level of foreman—are conducted upon a division basis.

The Alameda warehouse, therefore, is part of an integrated operation only physically removed from the management offices of the Division. The building could be a

physical part of the Division office without any significant change being necessary in the organization or operation of the business.

Indeed, it was specifically found by the trial court that defendant could carry on its operations in the East Los Angeles Division as well or better if all of its business in the Division were carried on in a single large building instead of five buildings geographically separated [Tr. 42]. This finding is supported by uncontradicted evidence [Tr. 138, 92, 94-95].

Appellant challenges this finding but nowhere is the challenge supported by reference to any evidence which would even suggest a contrary finding. Appellant makes much of the alleged reason for the physical separation. This however does not challenge the correctness of the finding which is to the effect that whatever the reason for the separation, the operations could be carried on as well or better in a single building. Appellant labels the findings a "speculative" or as "theorizing." On the contrary the finding is one of *fact* based upon uncontradicted expert testimony. Mere characterization is an insufficient basis upon which to attack a finding.

Several of the Company's divisions, as the statistics show [Tr. 35, 37], consist of only one warehouse. Appellant fails to show any valid reason why a division with more than one warehouse should be treated differently from a division with only one warehouse.

Appellant's case must be based entirely upon the single fact that the Alameda warehouse is separated geographically from the Division office. Appellant must concede that all of the business functions other than the physical work of moving and storing goods and the supervision and office

work directly incidental thereto, are conducted upon a division basis.

If Appellant's contention were adopted where, for example, would the line be drawn? If because of lack of space in a large central warehouse, part of the warehouse space were removed to an immediately adjacent building directly connected by passageways with the main warehouse, would it then become a separate establishment? What if the building were moved across the street connected by an overhead walkway? Would it make a difference if the walkway were then removed? Certainly Congress could never have intended that the removal of so tenuous a connection should be the criterion in determining whether or not a separate establishment existed. Would the result then be different if the building were moved a block or two away? It seems very clear that physical location alone cannot be the controlling factor.

Judge Carter, at the trial, stated:

> "What constitutes an establishment will depend upon the particular facts in each case. Certainly, it cannot be determined by the application of a geographical yardstick. For example, whether a warehouse used by a retail establishment is in an adjacent building, across an alley, across a street, around the corner or a mile or two away, is certainly not the test for determining whether the warehouse and the retail store constitute one establishment" [Tr. 142].
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> * * * * * * * *
>
> "If these five warehouses were located side by side down on Figueroa Street, I don't think plaintiff

would seriously contend that they were separate establishments. Or suppose four of them were located there and one of them was located out where it had a spur track, I don't think there would be any contention that they are separate establishments" [Tr. 146].

Even though naturally general in its definition, the dictionary shows that the word "establishment" means more than a single geographical location and includes the concept of a going business, organization or operational unit. Thus, Webster's New International Dictionary, Second Edition, Unabridged (1954) defines "establishment" as follows:

> ". . . c) A permanent civil, military, or commercial force or organization. (d) the place where one is permanently fixed for residence or business; residence, including grounds, furniture, equipage, retinue, etc., with which one is fitted out; also a situation or place of business with its fixtures and organized staff; as, a large *establishment;* a manufacturing *establishment* . . ." (Emphasis in quotation.)*

The dictionary definition has been referred to in a number of the cases discussed below.

We believe that ordinary and customary business practices are determinative in this case. There is much authority to support this result, but none to support the contrary result.

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*All italics ours unless otherwise indicated.

B. Section 13(a)(2), as Amended.

Section 13(a)(2), the application of which is in dispute in this case, was amended and radically changed in 1949. Prior to its amendment this section merely provided for exemption with respect to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in the intra-state commerce." (Chap. 676, Sec. 13, 52 Stat. 1067; Chap. 605, 53 Stat. 1266, 29 U. S. C. A., Sec. 213, [1947 Ed.].) As amended in 1949, the section reads as follows:

> "Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 percentum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ." (C. 736, Sec. 13, 63 Stat. 917 (1949), 29 U. S. C. A., Sec. 213.)

While the prior section may have involved some of the same considerations as those required under the amended section, the new section is more specific in detail and is most relevant as applied to the facts in this case. It will be noted that the amended section specifically refers to "annual dollar volume," to "sales of goods or services," to "not for resale" and to the "particular industry." Put together the reference is to the annual dollar volume of sales of goods or services made by the establishment within the state in which the establishment is located.

The clear purport of this section denies any reference to geographical location alone as being a criterion in determining the application of the exemption. The reference is to an operating business unit. How else could the annual dollar volume of sales be determined? Not one of the references in the amended section would apply to the Alameda warehouse. If it were determined to be an establishment, how could its annual dollar volume be determined? The Company would have to fundamentally alter its method of doing business carried on for half a century. Dollar value sales records and all other accounting and sales management methods are determined on the basis of the Division.

It is therefore clear that if geographical locations were a controlling factor, the tests which Congress adopted would have to have been otherwise stated. The fact that they were stated as they were shows that it is not the geographical location of a particular building which is to control, but rather the existence of a place of business or an operating unit thereof.

C. The Legislative History of Section 13(a)(2).

The legislative history preceding the 1949 amendments to the Act emphasizes the fact that Congress had in mind some reasonable relationship to ordinary business practices. In this case the business practices of Appellee have been substantially the same since its founding in 1895. Under those practices a single warehouse has had no significance as a separate business unit. It has merely been a physical part of the basic unit of the business, the division. To ignore these business practices would not only do violence to the clear intent of Congress, but would

base a distinction upon considerations that are not significant in the business operation.

The legislative history of the amendment to Section 13(a)(2) shows that physical location is not a controlling criterion in the application of that exemption. In the *House Manager's Statement* explaining the bill which was later enacted without change, the following is stated:

> "The location of the establishment, whether in an industrial plant, an office building, a railroad depot, or a Government park, etc., will make no difference in the application of the exemption.
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> * * * * * * * *
>
> "Since, however, the exemption does apply to any employee employed 'by' an exempt retail or service establishment, it is applicable to employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, whether or not the warehouse operation is conducted in the same building as the selling or servicing activities."
>
> House Managers' Statement, H. R. Rep. No. 1453, 81st Cong., 1st Sess. Oct. 17, 1949; 95 Cong. Rec. 14932 (1949).

Senator Holland, the sponsor in the Senate of the amendment to Section 13(a)(2) which was later enacted into law, had the following to say concerning the interpretation of that section in the light of business realities:

> ". . . The Congress used the terms 'retail' and 'service establishment' in their customary meaning, in their customary application, as they were custom-

> arily understood in the various industries of the Nation. How anyone, now, could oppose the giving of that concept to complete reality through this amendment, I fail to see, because it would simply carry out clearly what was the intention and objective of those who offered the original act, and those who voted for it and brought it to passage."
>
> 95 Cong. Rec. 12502 (1949).

Concerning the meaning of a retail sale or service, Senator Holland stated:

> "The question is what constitutes a retail sale and what constitutes service, and in each case that is not defined in the act, but instead is defined variably in various industries by determining what are the habits and practices in the industry.
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> * * * * * * * *
>
> "There could be various criteria which could be applied, one of which of course would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply. The well-settled habits of business must be applied. They will not necessarily be the same in all trades or businesses."
>
> 95 Cong. Rec. 12502 (1949).

In the cases which are discussed below, there has been a consideration of business practices in determining the meaning of the term "establishment." In no case has physical location alone been found sufficient to justify a finding that a separate establishment exists.

D. Appellant Itself, in Other Cases, Has Taken the Position First, That Geographical Considerations Are Not Controlling, and Second, That Business Usage and Practice Must Be Considered.

Appellant itself has conceded, indeed urged, in an action under the Fair Labor Standards Act, that a separate physical location should not determine the existence of a separate establishment.

Thus, in *Tobin v. Aibel* (D. N. Y. 1952), 112 Fed. Supp. 156, *affd.* (2d Cir. 1953) 204 F. 2d 376, the Department of Labor sought an injunction against the defendant restraining the use of home workers. This action was commenced pursuant to "Knitted Outerwear Industry, Minimum Wage Order" (29 C. F. R. Part 617); issued under the Fair Labor Standards Act. These regulations generally provide that in order for home work to be done in this industry, it is required that a certificate be obtained from the Department of Labor. Such certificates were denied to defendant and the major issue in this case was whether defendant's operations came within the Knitted Outerwear Industry definition. This definition provided:

> "The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same *establishment* as that where the knitting process is performed; . . . * * *"
>
> 29 C. F. R. Part 617, p. 189.

Defendants sought to avoid coverage under this definition by showing the basic fabric of the knitted garment was prepared at one location in New York and was distributed to the home workers at a second location. The determination of the case depended upon whether the geographically separate locations constituted one establishment. In granting the injunctive relief as petitioned for by the Department of Labor, this court said:

> "Some minor disputes are lately resolved. In the first place the defendants argue that the maintenance by them of a separate physical establishment (at East 109th Street) is of great significance. I think it is not. It must be manifest that the purposes of the act are not so easily frustrated, as in fact they would be if the act and the regulations for the particular industry were inapplicable when the operations are conducted in two physically separate premises.
>
> * * * * * * * *
>
> "I believe that defendants' operation is within the regulations and that plaintiff is entitled to an injunction which it seeks. I do not rest this decision solely on the broad sweep of the word 'establishment', nor solely on control of the corporation by the partnership, nor solely on the fact that a very substantial part of the business of both entities is conducted in the same premises, nor solely on the fact that the partnership habitually consumes the entire production of the corporation. I believe that all of these facts taken in conjunction point irresistably to the conclusion that there is but one 'establishment,' and that the operation is clearly within the language of the relevant regulation."

Tobin v. Aibel, 112 Fed. Supp. 156, 158.

In *Phillips v. Walling* (1945), 324 U. S. 490, 89 L. Ed. 1095, Appellant itself, a party in that case, advocated the position which was accepted by the Court, that business usage and practice should be considered. As stated in the summary of argument preceding the case report, Appellant argued:

> *"Under common business and governmental usage* each unit of a chain store system is a separate 'establishment' and a chain store warehouse is not a 'retail establishment.' "
>
> * * * * * * * *
>
> "The Policy of the act as a whole strongly supports the accepted governmental and business meaning of the words."
>
> *Phillips v. Walling,* 89 L. Ed. 1096, 1097.

That position taken in the very case upon which Appellant principally relies here, should be contrasted with the position taken in this case where Appellant argues directly to the contrary.

E. Appellants Cannot Base a Distinction Between Alameda and the East Los Angeles Division Upon the Fact That the Former May Store More Commercial Goods Than the Other Warehouses Making Up the Division.

Appellant in its brief seems to emphasize the fact that a significant part of Alameda's business is the storage of commercial goods. It does so by referring to the size of the building, its location and facilities (App. Br. p. 15). However, whether the warehousing service is to commercial or non-commercial users is irrelevant.

A distinction cannot be made between the warehouses in the Division or between the Alameda warehouse and the Division upon the basis that more commercial goods are handled at the Alameda warehouse than at the other

warehouses. In the first place, some commercial goods are stored at all of the warehouses in the Division, indeed, in all of the warehouses of the Company wherever located except one.

But more important, Congress has eliminated the distinction formerly drawn by the Administrator between sales and services to commercial users and sales and services to non-commercial users. Sales and services to commercial users can be retail as well as those to non-commercial users.

The United States Supreme Court prior to the 1949 amendments had held that a sale to a commercial user could not be a retail sale within the meaning of Section 13(a)(2). (*Roland Electrical Co. v. Walling* (1945), 325 U. S. 849, 89 L. Ed. 1970.) Congress specifically overruled this conclusion when it amended Section 13(a)(2) in 1949. The following excerpts from the Congressional History will remove any doubt in this connection.

The House Managers' Statement explaining the bill which was enacted without change, states:

> "The amendment (sec. 13(a)(2)), agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657); *McComb v. Diebert* ((E. D. Pa. 1949), 16 Labor Cases Par. 64,982); *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio 1948))."
>
> H. R. Rep. No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931 (1949).

Senator Holland, the sponsor of the amendment in the Senate which was later enacted into law, in criticizing the position of the Administrator concerning business or commercial sales, said concerning the Amendment:

> ". . . we propose to do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate, can never be held to be a retail sale under the regulations or under the interpretative rulings of the Administrator."
>
> 95 Cong. Rec. 12498 (1949).

Appellant's contention of necessity requires that customary business organization and practices be entirely ignored and that physical location alone should be the test. No court decision sustains this proposition. The courts as well as Congress in clear pronouncements establish business organization and practices as an important, if not *the* important criterion. Aside from such considerations, physical location alone is insufficient. Even Appellant has advocated a different view in other cases.

If physical location were to be adopted as the criterion where again would the line be drawn? What would be the situation if several buildings adjacent to each other and on the same property, each with several employees, existed with only one working foreman present? Would each building be a separate establishment? What if a group of employees worked in separate buildings with sufficient skill so that even a working foreman was not necessary except for periodic visits? If the facilities were provided in several buildings which existed separately at a given location instead of being located in several floors in one building, would this mean that each because of

separate physical location would be an establishment? If so, then each floor is also in a separate physical location—indeed so is each employee on that floor.

In answering a contention that a foundry and machine shop constituted separate establishments for unemployment compensation purposes, because of differences in type of work, terms of employment, immediate supervision and union representation, the Court in *Snook v. International Harvester Co.* (Ky., 1955), 276 S. W. 2d 658, discussed below, said:

> "To follow their argument to its logical conclusion, each *employee* would constitute a separate establishment because he is separately employed, works under different conditions, has a different seniority, etc."
>
> *Snook v. International Harvester Co.,* 276 S. W. 2d 658, 661.

II.

Appellant Relies Principally Upon the Case of Phillips v. Walling (1945), 324 U. S. 490, 89 L. Ed. 1095. To the Extent That It Is Applicable, This Case Supports Appellee's, Not Appellant's Position.

In the *Phillips* case, decided prior to the 1949 Amendments, the issue was whether employees working in the central office and warehouse of an interstate grocery chain store system, were employed in a retail establishment within the meaning of Section 13(a)(2). The company operated a chain of 49 grocery stores in two states. Quite apart from the retail stores the company operated a distributing system consisting of the ordinary wholesaling function. This operation included a separate office building and warehouse where the employees involved worked. The office and warehouse served all of the 49 stores.

The Court held that the employees of the central office and warehouse were not exempt under Section 13(a)(2).

The principal grounds for the decision were that the company carried on both retail and wholesale operations, that the function of the central office and warehouse in distributing goods to the various retail stores was a wholesale function, that the fact that the company operated both wholesale and retail operations did not mean that the wholesale function would thereby take on the characteristics of a retail function within the meaning of the Act, and that while the retail stores were exempt from the Act the wholesale operation was not so exempt.

The defendant in that case of necessity had to contend that the entire business operation of the company constituted the retail establishment even though a division of it was a wholesale operation. The *Phillips* case decided that the term "establishment" was not necessarily the equivalent of an entire business entity, but could be a separate operation or division within the business.

We do not take issue here with such a holding. It appears to us to be a logical result. But we fail to see how it assists Appellant's position.

We have not contended that the entire Company operation is a single establishment. We have merely urged that the divisions, of which there are 19, rather than each single warehouse which is only a part of the division, is the smallest unit of the Company which can be constituted an establishment upon any reasonable basis.

The *Phillips* case supports the position of Appellee. It shows that an establishment is a place of business, not just a geographically separate building or location. It specifically recognizes that normal and customary busi-

ness organization is a criteria that must be considered in determining what constitutes a separate establishment.

In these respects, the Court said:

> "But if, as we believe Congress used the word 'establishment' *as it is normally used in business and in government*—as meaning a distinct physical *place of business*—petitioner's enterprise is composed of 49 retail establishments and a single wholesale establishment. Since the employees in question work in the wholesale establishment, §13(a)(2) is plainly irrelevant."
>
> *Phillips v. Walling,* 89 L. Ed. 1095, 1100.

This quotation clearly specifies that in determining the meaning of establishment, normal business practices must be considered. This statement also shows that it is not the separate physical building which is the criterion but rather the distinct physical *place of business.* The statement not only refers in the same sentence to a place of business but also to the term establishment "as it is normally used in business and in government . . ." This is the heart of Appellee's position, namely, that the realities of business practices and bona fide business organization must be considered in determining what constitutes an establishment under Section 13(a)(2), and it is confirmed in the one case most heavily relied upon by Appellant.

Even the term "physical" in the quotation is dictum since the Court's decision was based upon a separate *function* not a separate *location.*

Appellant states that "Since the Supreme Court's decision in the *Phillips* case it has been settled that . . .

organizational structure is irrelevant in determining what is an 'establishment.'" (App. Br. pp. 10, 18). This statement is wholly erroneous. To the extent that this matter was settled by *Phillips* it was settled directly to the contrary—*as Appellant specifically argued in that case.*

This contention, erroneous as it is, is nevertheless the basis of Appellant's entire position in this case. Appellant throughout its brief on numerous occasions quotes the phrase "a distinct physical place of business" out of the *Phillips* case context and constructs its case upon that phrase. Yet nowhere in the entire brief is a quotation of the context—not even of the sentence—out of which that phrase was taken.

The sentence and the context completely refute any contention that organizational structure should not be considered, to say nothing of a contention that the matter is "settled" that it should not be.

Appellant, who was also party to the *Phillips* case, specifically argued in that case that common business and governmental usage and practice should be accepted. The Court agreed. But now Appellant changes its position and argues that it is settled that organizational structure cannot be considered. We believe that its first position, that advocated in the *Phillips* case, was correct.

Organizational structure is a part of business usage and practice. Otherwise the reference in the *Phillips* decision to normal business usage would be meaningless. The *Phillips* decision did not hold, indeed it did not even state, that organizational structure was not a consideration. On the contrary, the decision was based upon the organizational separation of functions. It held that business practice was a basic consideration.

Appellant, after listing various cases, further states:

> "The above decisions also make it clear that the principle of the *Phillips* decision is applicable even in the absence of geographical separateness. If units of a multi-unit organization are distinct from each other, they are separate 'establishments' for purposes of the 'retail establishment' exemption, even though located in the same building." (App. Br. p. 14.)

This statement concedes that geographical separateness is not a controlling consideration. But if physical location is not a test, and organizational structure or business practice is "irrelevant," what test exists? Appellant does not supply this basic deficiency even in argument in support of its own case.

The factual distinctions between the *Phillips* case and the instant case are at once apparent.*

In the first place, the wholesale function was self sustaining. It was a separate function and business operation distinct from the retail operation. It was specifically compared by the Court with the independent wholesaler in function and operation. The Court states that the employees involved were performing duties which were "economically, functionally and physically like those of the independent wholesaler's employees . . ." (89 L. Ed. 1101). The Court would have had no occasion to refer to such factors if physical location were the controlling criterion.

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*Appellant states (App. Br. p. 11) our contention to be that the Phillips doctrine is limited to chain store enterprises. We have not taken and do not take such a position here. It is not necessary to do so. It was Appellant who unsuccessfully endeavored to develop that concept as the record of testimony will show.

The trial court in the *Phillips* case (D. Mass., 1943), 50 Fed. Supp. 749 found the following facts, among others:

> "The defendant maintains separate accounts for each store. It keeps a record of the inventory of each store and of transfers of goods from one store to another, and a record of the cash deposits of each store. Merchandise is supplied to each store on the basis of requisitions prepared by the individual store manager, subject to revision by one of the three superintendents, each of whom supervises a group of stores."
>
> * * * * * * * *
>
> ". . . Invoices are made out for each shipment of goods from the warehouse to each store, and separate accounts and inventories are maintained for each retail store."
>
> ". . . When more than one store is situated in a particular city or town, they generally are so located as to serve distinct competitive areas, and not to supplement each other's service to the same section of the consuming public."
>
> *Walling v. A. H. Phillips,* 50 Fed. Supp. 749, 750, 751.

This quotation shows the facts to be quite different from the statement of Appellant (App. Br. p. 12) which indicates that the central office prepared payrolls, kept inventories, ordered goods, collected daily cash receipts, etc. for the group of stores as a whole. They were in fact all kept separately for each store. This is opposite from Appellee's practice where no breakdown exists for each warehouse.

In the instant case, the Alameda warehouse is an integral part of the Division operation; it has no separate management, supervision or record keeping. It is in no sense a separate and distinct business operation or subdivision. The basis of the decision in the *Phillips* case was that there was a distinction between entire functions, not between buildings. The Court thus separated the wholesale function, a separate operating part of the business, from the retail function. In the instant case there is no such distinction whatever. The integration of the Alameda warehouse with the division is complete.

Another clear distinction from the *Phillips* case is the fact that in that case the wholesaling function was of the conventional nature, distributing goods as would be true with an independent wholesaler distributing to 49 retail stores. The 49 retail stores were, of course, within the exemption. In this case the Alameda warehouse performs no such wholesaling function. It does not service the other warehouses either in the East Los Angeles Division or in any of the other divisions. In the organization of the company and in its function, it is on the same level and performs the same function as do the other warehouses in the Division. In no sense can its function be separated from the other warehouses or from the Division in the manner in which the wholesale function was separated from the retail function in the *Phillips* case.

Since the decision only involved the question as to whether the wholesale function was separate from the retail function for the purposes of the Act, the Court was not required to consider the relationship of one retail store to the other. For the purpose of the decision, it assumed that each was a separate business operational

unit—a separate retail store or establishment. However, the case does show that each store had a manager, separate accounts, its own record of inventory and transfers of goods, and its own records of cash deposits, that each store manager prepared its own requisitions, and that each was so located as to serve distinct competitive areas so as not to supplement each others' services.

The opinion also shows that the wholesale function would be substantially the same whether provided by an independent wholesaler or by the wholesale operation of the same company.

So far as appears from the decision, the employer in the *Phillips* case made no vigorous effort to show a single management, administrative organization, or accounting operation, including both the warehouse and the 49 retail outlets. It would be unlikely that such a large operation in many locations could be carried on as a single management operation. Yet the defendant in that case to succeed had to show that the warehouse and all of the retail outlets, or that the warehouse and any one or more of the store locations, constituted one establishment. Doubtless it was difficult to make such a showing. As a result, the decision based upon the facts in that case is a likely one.

In the instant case, however, the factual situation is quite different. Here there are five geographically separate warehouses merged completely in a single operating unit, all rendering the same type of service. Together they are the smallest unit that can be considered as a "place of business" and as a single establishment. The *Phillips* case in no way denies—indeed confirms—such a result. It is not authority for Appellant's position here.

In the *Phillips* case, therefore, the basic business unit was the retail store. The comparable basic unit in the business of Appellee is the Division. There can be no other comparison. It would be wholly unrealistic to compare the Alameda warehouse with a retail store. The only remote comparison would be if a given retail store consisted of five buildings instead of one large one and the holding had been that each building was an establishment. But there is no comfort to be found in the *Phillips* case in support of this proposition.

A. The 1949 Amendments Enacted After the Phillips Decision Confirm Its Support of Appellee's Position.

The *Phillips* case was decided under the law as it existed prior to 1949. The legislative history of the 1949 amendments affirmed the *Phillips* case but in doing so established new tests and emphasized the fact that the important, if not controlling criteria in determining what constituted an establishment, were to be based upon customary operating practice and business usage. There is no indication that the geographical location of a building was to be determinative of this question. That it could not be is shown by the facts in this case.

Under the old law the only test was whether an establishment was mainly engaged in intrastate commerce. The present section is completely different and requires an analysis of the company's business organization and practices and not the mere matter of geography alone. Under the amended section it is clear that consideration must be given to the operational, financial and accounting organization of the business. The whole basis of Section 13(a)(2) pertains to the volume of sales and revenue of the company.

One of the bases for the amendment to Section 13(a)(2) was that business realities had been ignored. This has been shown by the quotations from the legislative history set forth above. But even the language of the section itself confirms the intent to require a consideration of business practices. It specifically sets up as one of the tests—a recognition *"in the particular industry"* of sales as retail.

B. The Policy and Purposes of the Act Must Be Considered in Its Application.

The Fair Labor Standards Act has been treated in the *Phillips* case and in numerous other decisions as being a humanitarian statute. The Act specifically refers to the existence of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers." (Sec. 2(a)) and of its purpose "to correct and . . . eliminate" such conditions (Sec. 2(b)).

The basic purpose of the Act is thus stated. The courts, including the United States Supreme Court in the *Phillips* and other cases, have considered such a purpose in interpreting the Act. We believe it should also be considered here.

The acceptance of Appellant's contention could in no way effectuate the purpose and policy of the Act. On the contrary, it would upset an agreed and mutually satisfactory labor-management relationship which is the basic policy of another federal statute, the Labor-Management Relations Act of 1947, as amended. This Act declares that the public policy of the United States is to encourage:

> ". . . the practice and procedure of collective bargaining and [the protection of] the exercise by work-

> ers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. . . .
>
> * * * * * * * *
>
> ". . . practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, . . ."
>
> 61 Stat. 136, 29 U. S. C. A., Sec. 151.

It is precisely the effectuation of this policy which the agreement between the Appellee and the Teamsters Union promotes. The employees involved are represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of North America. The Court below found that:

> "The International Brotherhood of Teamsters Union is one of the most powerful unions of the United States. Its representatives are familiar with and keep in close touch with the business and operating problems of the employers of its members including defendant." [Tr. 47.]

This fact, even if not found, is so well known that the Court could take judicial notice of it. The Teamsters Union has negotiated a collective bargaining agreement [Tr. 20 *et seq.*] with Appellee which provides in detail for the wages, hours and working conditions of the employees involved in this case. Even a cursory glance at this agreement will show that no problem of the maintenance of a minimum standard of living is involved. This Union, which is familiar with the business and operating problems of Appellee and other employers in the industry, has

negotiated a normal workweek of forty-eight hours consisting of six eight-hour days.

The only logical conclusion is that the Appellee and this powerful union have concluded that a six-day-straight-time workweek is most appropriate for this industry. This is particularly true when it is considered that employees at the warehouse not represented by the Union and in a different category where the forty-hour week is no problem, are paid overtime after forty hours per week [Tr. 39]. Furthermore, in negotiating the straight-time hourly rate, the realities of labor-management relations demonstrate that the straight-time hourly rate agreed to would take this workweek into account.

We believe that this Court may also judicially notice the fact that in most industries the prevailing pattern of negotiated contracts provides for overtime after 40 hours of work per week (five eight-hour days) and after eight hours in any one day. This is reflected in the requirements of the Fair Labor Standards Act. Yet here, one of the most powerful unions in the country has willingly agreed to a six-day week with overtime after 48 hours rather than after the prevailing 40 hours. Again, the only logical conclusion is that this Union recognized the realities of Appellee's business operations and has agreed to a workweek which differs from that prevailing elsewhere. The fact that it has done so is most significant.

We, of course, realize that the agreement of the parties cannot take precedence over the requirements of the Act. However, the foregoing considerations are most relevant in resolving the disputed meaning of the Act in this case. The courts, including the United States Supreme Court in the principal case relied upon by Appellant, have shown

that such considerations are proper in such cases. Specific reference has been made in interpreting the Act to its basic policy and purposes. Furthermore, the acceptance of Appellee's position would effectuate the policy of the Labor-Management Relations Act without contravening that of the Fair Labor Standards Act.

In this case there is no basis for urging the application of the Act to effectuate its policy or humanitarian purpose.

As stated by Judge Carter during the trial of this case:

> ". . . I have listened to all the talk about how the new administration was going to get the administrative agencies down to business, and here I find them worrying about ten employees who are members of the Teamsters' union, and the Court will take judicial notice of the status of the Teamsters' union—I used to do some labor work, I never represented the Teamsters, but I know something about them—ten employes they are trying to bring within the Wage and Hour Act.
>
> "I don't know. I shouldn't comment, because I don't know what other business your department has pending. I know some of the cases are closed by consent decrees, but it is certainly a disillusionment for me to find an administrative agency straining to extend the coverage of this Act over these ten employees." [Tr. 105-106.]

The considerations which resulted in the agreement between Appellee and the Teamsters Union are set forth in the Findings of Fact [Tr. 47-48]. The overtime rate after 40 hours for operating employees at the Alameda warehouse would upset Appellee's prevailing wage patterns, create wage inequities between groups of its employees

and adversely affect employee morale. Furthermore, Appellee handles a greater volume of business on Saturdays. If overtime were required for this day, *i.e.,* between 40 and 48 hours of work, Appellee would have to increase its rates. The volume of business would thereby be substantially decreased, because more persons would handle their own moving or find other ways of meeting the problem by means of trailers and rental trucks. Appellee could not close its Alameda warehouse after 40 hours had been worked in a workweek because the Teamster contract provides a normal workweek of 48 hours, Monday through Saturday, and requires a reopening in the event of a change..

These are all substantial considerations undoubtedly reflected by the collective bargaining agreement between Appellee and the Teamsters Union.

C. The Practical Business Consequences of the Interpretation of the Act Is a Consideration in Determining Its Meaning.

The United States Supreme Court in the *Phillips* case, found that to reach a contrary result, namely, to hold that the wholesaling operation of a chain store system is included as part of the same establishment as the retail operation, would discriminate against independent wholesalers which had no retail operation. Thus, in the *Phillips* case, the Court stated:

> "These duties, rather, are economically, functionally and physically like those of the independent wholesaler's employees who, when engaged in interstate commerce, are admittedly entitled to the benefits of the Act. We fail to perceive in Sec. 13(a)(2)

> or in its Congressional background any intent to discriminate against chain store employees engaged in wholesale activities or to give to chain store warehouses a competitive advantage in labor costs over independent wholesalers."
>
> *Phillips v. Walling,* 89 L. Ed. 1096, 1101.

The courts in other cases such as *Burhans v. Montgomery Ward & Co.* (S. D. N. Y., 1952), 110 Fed. Supp. 184, discussed below, have also considered this factor. In that case the Court said:

> "Judge Soper did not consider a physical connection between the warehouse and the retail store essential to an application of the exemption provisions of Sec. 13(a)(2) of the Act. A similar ruling had been made in Duncan v. Montgomery Ward & Co., D. C., 42 F. Supp. 879. Any other interpretation would result in conferring on a large retail store, that was so fortunate as to have an adjacent building as its warehouse, an unfair economic advantage over a large retail store that had its warehouse a mile away from the store itself. Interpretations of the statute that would result in any such discrimination are to be avoided."
>
> *Burhans v. Montgomery Ward & Co.,* 110 Fed. Supp. 184, 196.

In determining therefore what the term "establishment" means, the courts have considered the possible effect of the determination not only upon the company, but upon business activities in industry generally. In the *Phillips* case, a consideration was that the practical effect would result in discrimination against independent wholesalers.

In the instant case for exactly the same reason the practical effect should also be considered. In this case, were Appellant's contention upheld, a "discrimination" of a different type would exist within the Company. It would mean that one warehouse out of five in the East Los Angeles Division (and out of 36 throughout the Company's operation) would have overtime compensation provisions, record keeping requirements and consequent conditions different from all the rest. Instead of a uniform operation recognized both by the industry and the Union with which it contracts, one warehouse would have to be separately treated. This would create a situation and operation problems which would certainly be as acute to the company as would be the possible discrimination referred to in the *Phillips* and other cases. The avoidance of such a situation and of such an illogical result should be a consideration in determining whether one warehouse alone out of the five in the Division should be singled out for separate treatment as an "establishment."

The *Phillips* case, therefore, is authority for the position of Appellees in that it holds first, that the place of business and not just a geographically separated building is the criterion, and second, that as contended by Appellant in that case, common business and governmental usage and meaning must be considered in determining what is meant by "establishment." Under either criteria, the Division and not the Alameda warehouse is the establishment.

The case also shows that the policy of the Fair Labor Standards Act and the practical consequences of its application, must be considered in its interpretation.

III.

Decisions Since the Phillips Case Also Confirm the Correctness of Appellee's Position.

Several decisions concerning the meaning of the term "establishment," have been rendered by various courts, both before and after the *Phillips* case was decided. While perhaps more akin to the *Phillips* case situation than to that involved here, they are nevertheless persuasive authority in support of Appellee's position.

In *Burhans v. Montgomery Ward & Co.* (S. D. N. Y., 1952), 110 Fed. Supp. 184, the company operated a retail store, a part of which was a warehouse or stockroom for the storing of merchandise handled by the store. The business expanded and to provide additional warehouse space, a building approximately one mile distant was obtained. The merchandise received and stored in both buildings was carried in a single inventory. Both were under common supervision. The manager of the store was responsible for every phase of the operation including both warehouses and was assisted by two assistant managers. A single local union represented the employees of both the store and the warehouse under a single agreement.

On all company records, both buildings were treated together as a unit including the monthly sales and profit and loss statements, inventory and other statistics and data. A single bank account was maintained and disbursements were made for both locations as a unit. A single payroll was maintained. Management functions were performed and records kept at the original location for both buildings. The warehouse building and ware-

house facilities at the original location served only the single retail store.

The facts, therefore, are very close to those involved in the instant case except that here the warehouse does not even service another part of the Company's business.

The Court considered the *Phillips* case and its applicability to the facts before it. It held that the *Phillips* case was not controlling stating that "The warehouse in the case at bar does not in any important particular fit the description of the warehouse in the *Phillips Co.* case." (110 Fed. Supp. 195.)

The Court then stated:

> ". . . The warehouse was not physically connected with the Albany retail store, but was a mile away; however, that is not determinative of the issue. In every other way it was part and parcel of the Albany retail store. It is the use made of the warehouse, not its location, that is important. A large retail store requires adequate space to store its stock. This it may do in the same building in which the store displays its merchandise for sale if suitable space is available; or it may store part of its stock in some local building whose location may depend on many collaterial considerations. But if the function of the warehouse is solely to supplement and complete the functions of the retail store, and if the warehouse is in effect operated as a part of the retail store although not physically connected with it, the warehouse would, in my opinion, be part of the 'retail establishment.' "
>
> *Burhans v. Montgomery Ward & Co.,* 110 Fed. Supp. 184, 196.

The Court also referred to various Interpretative Bulletins of the Wage and Hour Administrator as follows:

> "The original Interpretative Bulletin issued by the Administrator in 1938 used the term 'retail establishment' as meaning the same thing as a retail enterprise or business. The revised Bulletin (Interpretative Bulletin No. 6, June 16, 1941) in applying the term retail establishment to a multi-unit company, held that it would not mean that the entire business was a single retail establishment. Section 36 of the revised Bulletin stated that if there was *unity of ownership of all departments in the store and if they were all operated as a single store, the enterprise taken as a whole would be considered an 'establishment'* within the meaning of Section 13(a)(2). That bulletin also held that warehouses, performing 'wholesale functions,' were not included in the exemption. Finally, Interpretative Bulletin, 15 F. R. 7245 (issued after the amendment of Sec. 13(a)(2) in October 1949) specifically held that employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, are exempt as employees 'employed by' the exempt establishment *'regardless of whether or not the warehouse operation is conducted in the* same building as the selling or servicing activities'."
>
> *Burhans v. Montgomery Ward & Co.,* 110 Fed. Supp. 184, 196.

The Court also stated that "the defendant was not doing a wholesaler's business at the warehouse. Part of the local Albany store's business was done there, and that was a retailing business." (110 Fed. Supp. 200.)

Appellant concedes the correctness of the *Burhans* case [Tr. 104]. However, it states that it is not applicable

here. Actually, however, it is closely analogous to the facts in this case—much more so than to those in the *Phillips* decision. In both the instant case and in *Burhans* the only difference between the locations comprising the establishment was one of physical location. In the *Phillips* case the significance of separate physical location was not even the question involved.

This case is very persuasive authority for the position urged here by Appellee.

Other cases are similiarly persuasive.

Bogash v. Baltimore Cigarette Service (4th Cir. 1951), 193 F. 2d 291, involved a suit for overtime compensation brought by several employees of the defendant company. The business of the defendant was the installation and maintenance of cigarette vending machines. These machines were placed in various locations throughout the area and the employer maintained an office and a warehouse which was used to repair and store machines not in actual use. It was contended by plaintiffs, and the Department of Labor as *amicus curiae,* that the central office and warehouse were not part of a retail establishment but rather constituted a wholesale establishment whose employees therefore did not come within the exemption of 13(a)(2).

In finding that the *Phillips* decision did not apply and that the central office and warehouse did not constitute a separate establishment, the Court said:

> ". . . There is substance in the ruling that chain store systems combine wholesale as well as retail elements into a single system which must be separated in order that the affirmative provisions as well as the exemptions of the statute may be given effect.

> But this procedure may not be carried so far by the courts as to divide a genuinely retail business into separate parts, so as to hold that the exemptions apply only to those employees who perform the act of selling. All employees employed by a 'retail establishment' as defined in the statute are covered by the exemption."
>
> *Bogash v. Baltimore Cigarette Service,* 193 F. 2d 291, 294.

Again, *Montgomery Ward & Co. v. Antis* (6th Cir. 1947), 158 F. 2d 948, *cert. denied,* 331 U. S. 811, 91 L. Ed. 1831, involved the exempt status of employees in a warehouse operated by Montgomery Ward. This warehouse distributed merchandise to four retail stores in the Detroit area out of some 600 operated by the Company, and also performed service and repair functions for the stores and for retail customers. In finding that the employees employed in the warehouse were exempt, the Court said:

> ". . . the Phillips decision does not lay down the doctrine that all employees in a building operated as a warehouse are, by reason of that fact alone, within the coverage of the Act. If their employment is in no wise concerned with the wholesaling aspect of the employer's dual or hybrid character as considered in the Phillips case, and they are engaged solely in furthering the activities of retail stores, they may not be within the coverage of the Act, . . ."
>
> *Montgomery Ward & Co. v. Antis,* 158 F. 2d 948, 951.

In *Duncan v. Montgomery Ward & Co.* (S. D. Tex. 1941), 42 Fed. Supp. 879, the company operated a retail store business in Houston, Texas. Because of limitations

of space in the downtown business area, high rents and the absence of a railroad spur, the company found it necessary for reasons of economy and efficient business operation, to have warehouse space located elsewhere for the storage, handling and stocking of its merchandise. The employees involved were employed at the warehouse performing the usual functions involved in warehousing for a retail store business.

In holding that the retail store, including the warehouse, constituted a single establishment within the meaning of the Act, even prior to its amendment, the Court said:

> "The conclusion reached is that Defendant is a retail establishment within the meaning of the second exception quoted [Section 13(a)(2)] notwithstanding the fact that it uses a retail warehouse, purchases some of its merchandise in interstate commerce, ships some merchandise from its retail warehouse to other warehouses in other States, and sells an insignificant amount of its goods (less than 1%) in interstate commerce."
>
> *Duncan v. Montgomery Ward & Co.,* 42 Fed. Supp. 879, 883.

The Court also held that employees were employed in a local retail capacity within the meaning of Section 13(a)(1) of the Act and therefore exempt.

The foregoing cases are *a fortiori* for Appellee's position here since they involve situations where the warehousing function was to supply and service the retailing part of the establishment. The Alameda warehouse does not service the other warehouses in the division or store goods for such warehouses. For this additional reason it cannot be considered as a separate establishment.

A. The Cases Relied Upon by Appellant Do Not Support Its Position.

The cases cited by Appellant do not support the holding urged by it. Most of the cases involve the same type of situation with which the *Phillips* case dealt; each cited the *Phillips* case as the basis of decision. Most were also decided prior to the 1949 amendments. One was decided before the *Phillips* case decision and reached the same result. Others, in addition, placed emphasis upon the manufacturing or production, as distinguished from the distribution or retail, function.

Walling v. American Stores Co. (3d Cir. 1943), 133 F. 2d 840, was decided prior to the *Phillips* decision. The Court stated the question before it as follows:

> "The question is whether the sum total of the activity of the American Stores Company constitutes a 'retail establishment' so as to exempt the entire enterprise from the mandate of the statute."
>
> *Walling v. American Stores Co.,* 133 F. 2d 840, 841.

This case involved eleven warehouses in five states, seven bakeries, two canneries and numerous other businesses, as well as some 2,300 stores. The Court, not surprisingly, reached the same result as was reached in the *Phillips* case, namely, that the entire operation did not constitute a single establishment.

In *Walling v. Goldblatt Bros.* (7th Cir. 1945), 152 F. 2d 475, *cert. denied,* 328 U. S. 854, 90 L. Ed. 1627, the warehouses performing a wholesale function served a chain store system operating fourteen department stores, a drug store and bakery, and the central offices of the system. Again, *Phillips* was quoted extensively and was the basis of the decision. It should also be noted that in

this case the employees of the State Street warehouse, excluding a drapery production shop, were held exempt under Section 13(a)(2). This warehouse principally serviced one of the retail outlets and was located in proximity to it.

In *McComb v. W. E. Wright Co.* (6th Cir. 1948), 168 F. 2d 40, *cert. denied,* 335 U. S. 854, 93 L. Ed. 402, the warehouses and supply yards distributed goods to several retail outlets and housed the general offices and administrative departments. The operation was classified as a "merchandising institution 'of a hybrid retailing wholesale nature' within the rationalization" of the *Phillips* case. Much emphasis was placed upon the wholesale aspects of the warehouses and supply yards.

In *McComb v. Wyandotte Furniture Co.* (8th Cir. 1948), 169 F. 2d 766, two warehouses serviced five retail stores in two states. The Court, upon the basis of the *Phillips* decision, ruled that the warehouses were not part of the retail establishment.

Fletcher v. Grinnell Bros. (6th Cir. 1945), 150 F. 2d 337, involved a wholesale function including a warehouse supplying a number of retail stores. The *Phillips* decision required the same result.

In *Armstrong Co. v. Walling* (1st Cir. 1947), 161 F. 2d 515, the Court found that a commissary department which made, wrapped and delivered sandwiches and related articles to retail outlets in four states was a wholesaling activity as was true in the *Phillips* case which the opinion cited.

In *McComb v. Casa Baldrich, Inc.* (D. Puerto Rico 1948), 80 Fed. Supp. 869, the Court found that a printing plant did not constitute a retail establishment where the defendant had not shown that less than 25 per cent

of its sales were to wholesalers—an administrative criterion under the Act prior to its amendment.

Mitchell v. E. G. Shriner & Co. (7th Cir. 1955), 12 WH Cases 453, involved a company operating 33 retail markets in four states, the Court holding that the central office employees servicing these stores were engaged in commerce and that such employees were not exempt as employees of a retail establishment.

Fred Wolferman, Inc. v. Gustafson (8th Cir. 1948), 169 F. 2d 759, is inapplicable for the further reason that considerable emphasis was placed upon the producing or manufacturing type of activity involved as distinguished from the distribution or retail function. In that case, the employees were employed by a candy kitchen manufacturing candies and salad dressing. These products were supplied to several retail stores. The Court held that they were not exempt under Section 13(a)(2).

A review of the foregoing cases will show that they clearly fall into the Phillips type of category. In addition, some of them involve a producing or manufacturing function which is outside of Section 13(a)(2). They no more require the finding urged by Appellant than does the *Phillips* case; indeed in several of the situations even less. None of these cases stand for the proposition that the Alameda warehouse, separate from the others, constitutes a separate establishment. Indeed, in the various cases, the courts have grouped all of the warehouses and considered them together. These cases would be authority for Appellant only if there were some indication that the courts tended to treat each warehouse building separate from all the rest, and then only if each building was a separate business unit instead of merely part of one. None of the cases support any such result.

IV.

The Interpretation of the Term "Establishment" Under the Various Unemployment Compensation Statutes Supports the Position of Appellee.

A very similar question concerning the meaning of "establishment" is presented under the various state unemployment compensation laws. While the legal question involved is, of course, different, the similarities to the issue in this case are quite clear. The analogy is sufficiently close to provide persuasive authority for the position of Appellee.

In some states these statutes provide in general that employees are not eligible for unemployment compensation if their lack of employment resulted from a labor dispute at the "establishment" where the employee worked. In other states, the statutes refer to the "factory, establishment or other premises" instead of the "establishment" alone. The question has therefore been raised in various cases as to the meaning of these terms.

While the cases reach different results based upon the factual situation involved and place a varying emphasis upon the factors considered, the results strongly confirm Appellee's position. There is no case which we have found which warrants the holding contended for here by Appellant. None holds that a warehouse or other building which is merely part of a business unit or operation function constitutes an "establishment."

In *Spielmann v. Industrial Commission* (1940), 236 Wisc. 240, 295 N. W. 1, the unemployment compensation law did not allow payment of unemployment benefits to an employee if the reason for his lack of work was a labor dispute at the "establishment" where he

worked. The case involved the Nash Company which had two plants 40 miles apart, each of which performed part of the work of building completed Nash automobiles. The operations of the two plants were closely integrated, each performing related functions in the manufacture of automobiles. One built the bodies and the other manufactured other parts and assembled the cars. The hourly rate of production was synchronized. A single manager was in charge of the two plants. The employees in question were out of work at one of the plants because of a strike at the other plant. The Court summarized its view as follows:

> "It appears from this summary that although the two plants were forty miles apart, they were just as much a single establishment for the manufacture of automobiles as they would have been had they been in two buildings adjacent to each other, or in separate parts of the same building."
>
> *Spielmann v. Industrial Commission,* 295 N. W. 1, 4.

The Court reached this conclusion even though the plants were 40 miles apart, each had its own separate labor union and collective bargaining contract, and its own seniority and service records, the negotiations for working conditions were carried on independently, employees in one plant had no standing in the other, the hiring and discharge functions were separately exercised, and the employment relationship was independent.

In *Chrysler Corporation v. Smith* (1941), 297 Mich. 438, 298 N. W. 87, a similiar result was reached. In this case, a strike at the Dodge main plant caused a lack of work in nine other plants in the Detroit area within

a distance of 11 miles of each other. The employees at all of the plants were represented by the same union. It was found that the Company's operations were functionally integrated and synchronized, that the operations of the various plants were controlled from the main plant, that "the central accounting, engineering, export, mailing, production, purchasing, routing and service departments" (298 N. W. 87, 89) were all located in or immediately adjacent to the main plant, although each plant had individual plant managers and engineers who supervised the immediate operations of their respective plants.

The Court held that under these circumstances all of the plants constituted one establishment.

In *Mountain States Tel. & Tel. Co. v. Sakrison* (1950), 71 Ariz. 219, 225 P. 2d 707, the question was whether the 39 exchanges in Arizona operated by the company constituted separate establishments, or a single establishment. It was found that all of the exchanges constitute a single establishment. While the department into which the employees were segregated were separable on a functional, personnel, accounting and direct supervisory basis, they were interdependent to the extent that continued operation of an exchange would be impossible if any one were eliminated. The company's operations were conducted on the basis of a state wide organization and all were subject to central supervision and control. The operations within the state constituted a single unit for rate making and taxing purposes. Billings for local service were handled by a central accounting department and the services were interdependent. All departments were within the various exchange buildings.

In the very recent case of *Snook v. International Harvester Co.* (Ky. 1955), 276 S. W. 2d 658, the question was whether the foundry and machine shop of the company were part of the same establishment. A strike against the machine shop by one union resulted in a layoff of the foundry employees represented by another union. This court in a previous case, *Ford Motor Co. v. Kentucky Unemployment Compensation Commission* (Ky. 1951), 243 S. W. 2d 657, had held that employees laid off at a Kentucky plant were eligible for unemployment compensation even though the reason for the layoff was a strike at the company's plant in Michigan. The decision there was that the two plants, widely separated in two states, did not constitute a single establishment. The Court in the later case, however, drew a distinction upon the ground that the foundry and the machine shop were in the same state and in close proximity. It therefore held that both constituted a separate establishment.

In denying the argument that from the standpoint of employment conditions the foundry and machine shop were separate entities because of a difference in the type of work, terms of employment, immediate supervision and union representation, the Court said:

> ". . . To follow their argument to its logical conclusion, each *employee* would constitute a separate establishment because he is separately employed, works under different conditions, has a different seniority, etc."
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> *Snook v. International Harvester Co.*, 276 S. W. 2d 658, 661.

In some cases involving the application of unemployment compensation statutes, the effort was made to have the entire business declared a single establishment, as was

done in the *Phillips* case. As in the *Phillips* case, this contention was rejected and it was determined that an establishment was not necessarily synonymous with an entire business but could also refer to a subdivision or operating unit of a business.

This was true in *Ford Motor Co. v. New Jersey Department of L. & I.* (1950), 5 N. J. 494, 76 A. 2d 256, where a strike took place in Michigan which resulted in a layoff at the New Jersey plants; in *Nordling v. Ford Motor Co.* (1950), 231 Minn. 68, 42 N. W. 2d 576, where a strike at the Dearborn, Michigan plant resulted in a layoff at the St. Paul, Minnesota plant; and in *Tucker v. American Smelting & Refining Co.* (1947), 189 Md. 250, 55 A. 2d 692, where a strike at a mine in Utah caused a layoff at a mill in Maryland. In each of these cases, the statute involved the interpretation of the term "at the factory, establishment or other premises." In each case, not surprisingly, it was held that the widely separated operations were not a single "factory, establishment or other premises."

In the *Tucker* case, a comparison with the facts in the *Spielmann* case is made which is applicable here, namely, that in the *Spielmann* case where the plants were only 40 miles apart there was a "functional integrality," "general unity" and "physical proximity" which was not true in the *Tucker* case where the two plants found to be seperate establishments were thousands of miles apart (55 A. 2d 692, 694).

In *Ford Motor Co. v. New Jersey Department of L. & I.*, the Court refers to normal business usage as a consideration (76 A. 2d 260); and also distinguishes between a "far-flung enterprise" as a single industrial unit

and a plant or operational unit. In referring to the *Chrysler* and *Spielmann* cases *supra,* the Court said:

> ". . . There, 'establishment' alone was used to define the statutory class; and there were geographical proximity and other factors which in the judgment of the court made the totality of members one 'establishment,' so that a labor dispute at one plant would include all as a unitary whole."
>
> *Ford Motor Co. v. New Jersey Department of L. & I.,* 76 A. 2d 256, 261.

The Court in the *Nordling* case held that functional integrality, general unity and physical proximity are factors that should be taken into consideration in determining the ultimate question of whether a factory, plant or unit of a major industry is an establishment separate from the business as a whole. It stated, however, that they were not the only factors. The Court held an important factor to be whether the operation is separate or unified in so far as the employees and employment conditions were concerned (42 N. W. 2d 587).

In the instant case, of course, all of these tests are met by the East Los Angeles division rather than by the Alameda warehouse alone. Hiring and discharge are on a division basis. There is a single union and any strike action, if not on a company-wide basis, presumably would be at least on a division basis. Seniority rights apply throughout the division, not to the Alameda warehouse alone. The employees regularly interchange between the various warehouses. Unemployment compensation payments are made, for all employees of the Division, indeed for the Company as a whole, not just for the Alameda warehouse.

In *Tennessee, Coal, Iron & R. Co. v. Martin* (1948), 251 Ala. 153, 36 So. 2d 547, it was held that coal mines owned and operated by the company constituted an establishment separate from the steel mills and ore mines operated by the same company. The Court determined that the seven criteria referred to in the *Spielmann* case were of value "as indicating the true nature of the operational set up of a manufacturing business. If these factors are not of importance, then just what elements would furnish light as to the true situation?" (36 So. 2d 547, 551.)

In *General Motors Corporation v. Mulquin* (1947), 134 Conn. 118, 55 A. 2d 732, the question involved whether two plants located eighteen miles distant from each other constituted a "factory, establishment or other premises." The Court's statements in deciding this question are most relevant:

> ". . . In its customary acceptation, a factory is a building or group of buildings used in connection with each other for the common purpose of manufacturing articles, usually, but not necessarily, in the same inclosure or same immediate neighborhood. (Liebenstein v. Baltic Fire Ins. Co., 45 Ill. 301, 303."
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> * * * * * * * *
>
> ". . . The solution is not to be found merely in its physical isolation from Bristol, a circumstance which, as their memorandum indicates, the commissioners deemed decisive. Geographical separation is important but is by no means controlling. *Where, as here, a manufacturing corporation carries on its business in buildings at different localities, the test is whether they are so operated as to constitute a*

single unit; if so, they amount to a single factory. The application of this test requires a consideration of many factors, such as the scheme of management, supervision and production of each plant; that is, whether or not those locally in immediate charge, let us say, of the one plant, are subject to the authority of those operating the other, as distinguished from their being under the control of policy-framing officials ranking higher in the pyramid of the corporate structure. Consideration should likewise be given to the source of authority in hiring, paying and discharging employees, to the methods of making purchases and sales, to the manner of handling accounts, and to all other relevant and kindred matters. . . ."

General Motors Corporation v. Mulquin, 55 A. 2d 732, 736, 738.

The foregoing cases therefore all stand for the proposition akin to that enunciated in the *Phillips* case, that the term "establishment" is not necessarily the same as the entire business entity, with ultimate management or common ownership the criterion, but that separate divisions or separate functions can be separate establishments. Not one of the above cases, nor indeed any case we have found, has held that a separate building comprising only part of an operating unit of the company, without any organizational or employment identity other than its separate location, constitutes a separate establishment.

All of the cases refer to operating, functional or employment units, plants, or places of business. They refer to customary and usual business practices and to factors which are entirely absent in the instant case. Thus, reference is made to employment, hiring and dis-

charge practices, union representation, record keeping practices, supervisory practices, interchange of employees seniority, management and operating practices, functional similarity, and so on. If a significant number of these practices and functions are common to a particular business unit, that fact has been persuasive in finding such unit to constitute an establishment. We have found no case which has found an establishment to exist where none or only an insignificant few of these factors are applicable. In the instant case not one applies to the Alameda warehouse. On the other hand, substantially all apply to the East Los Angeles Division.

As a result the Alameda warehouse is not an establishment within the meaning of Section 13(a)(2). On the contrary, upon the basis of all the tests, the Division is the smallest unit of the Company which can be termed an establishment.

For the foregoing reasons we urge the Court to affirm the judgment of the Court below dismissing the Complaint.

Respectfully submitted,

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